UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/469
17 November 1989
ENGLISH

ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 469

Case No. 442: SALAYMEH

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Ahmed Osman; Mr. Ioan Voicu;

Whereas, on 25 June 1987, Abdul Muneim Hassan Salaymeh, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of the Rules of the Tribunal;

Whereas, on 24 August 1987, the Applicant filed an application, the pleas of which read as follows:

"SECTION II

PLEAS

Decision contested:

1. UNRWA deducted 19.9% of my total Provident Fund (P.F.) credits on 31.12.1985. The amounts deducted are: (...)

Employee credits Austrian schillings	A.S. 235 259.61
Agency (UNRWA) credits Austrian schillings	A.S. 436 273.15
Total amount deducted:	A.S. 671 532.76

2. UNRWA deducted again 19.8% of my total Provident Fund (P.F.) credits on 31.12.1986. The amounts deducted are: (...)

Employee credits	A.S. 207 928.59
Employee Voluntary credits	A.S. 15 488.92
Agency (UNRWA) credits	A.S. 415 857.17
Total amount deducted	A.S. 639 274.68

3. To the amounts deducted in 1 and 2 above should be added the interests of the Provident Fund declared by the Commissioner-General of 13.5% for 1985 and 15.0% for 1986 and for all the period up till the time of repayment of theses amounts. Thus the total amount deducted would be AS 1,541,610.80 up till my retirement on 31 August 1987. This amount is equivalent to the salary of 25.02 months as at 31.12.1986 when my salary was AS 61,623.00 per month.

Decisions and measures requested by the Tribunal:

The deductions of these amounts by UNRWA are not in conformity with the staff rules governing the Provident Fund. Therefore, I request that these amounts be reinstated to my credit plus interest up till the time of reinstatement of theses funds."

Whereas the Respondent filed his answer on 23 February 1988;

Whereas the Applicant filed written observations on 8 April 1988;

Whereas, on 19 September 1988, the Applicant submitted additional documents;

Whereas, on 30 September 1988, the Respondent submitted further comments on the case;

Whereas, on 4 and 25 October 1988, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 11 and 28 October 1988, the Respondent provided answers thereto;

Whereas, on 11 November 1988, the Tribunal decided to adjourn its consideration of the case until 1989;

Whereas, on 24 January 1989, the Respondent submitted an additional document;

Whereas, on 8 March 1989, the Applicant submitted additional comments and on 15 June 1989, the Respondent provided his comments thereon;

Whereas, on 11 and 30 October 1989, the President of the Tribunal put further questions to the Respondent and also asked him to submit a number of documents and on 18 October and 6 November 1989, the Respondent provided answers thereto;

Whereas, on 10 and 13 November 1989, the Applicant submitted additional comments on the Respondent's answers to the questions put by the Tribunal;

Whereas the facts in the case are as follows:

Abdul Muneim Hassan Salaymeh served UNRWA as an area staff member from 19 July 1953. During the course of his employment, he served at different duty stations until August 1978, when he was transferred to UNRWA headquarters in Vienna, Austria. He served as a Senior Education Officer until 31 August 1987, when he separated from the service of UNRWA.

The Applicant, as an area staff member, was not a participant in the United Nations Joint Staff Pension Fund. Instead, he was entitled to benefits from the "Provident Fund" established by the Commissioner-General in 1955 for such staff members. Entitlements from the Provident Fund are governed by area staff rules 106.1 and 109.10. Staff rule 106.1 defines the nature of the Provident Fund as well as the eligibility for participation in the Fund. Paragraph 20 of the rule provides that the Provident Fund shall be "administered and controlled by and at the discretion of the Commissioner-General, and in accordance with such instructions and procedures as he may prescribe."

On 25 February 1986, the Applicant and other area staff members requested the Commissioner-General to review the administrative decision to reduce by 19.9% Provident Fund credits on 31 December 1985 "due to losses on exchange rates resulting from the drop in the value of the US dollar against the Austrian schilling". They argued that any deductions from Provident Fund credits were inconsistent with the Agency rules and "an infringement on private property of staff ...". On 26 March 1986, the Applicant wrote to the Commissioner-General, requesting restoration of the amount of 671,532.76 Austrian schillings to his Provident Fund credits, which amount corresponded to reductions for exchange rate losses.

READEX
FICHE

In an Area Staff Circular No. AV/1/86, issued on 4 April 1986, the Acting Commissioner-General announced that the Commissioner-General had asked the Provident Fund Advisory Committee to study, at its forthcoming meeting in April, the questions raised by area staff members concerning "the recent drop in the level of the amount credited to them in the Provident Fund". The Committee, which had engaged a consultant to review the Fund's investment policies of and the investment results of the Fund's four bankers, would report to the Commissioner-General on the results of its deliberations. Having received no reply from the Commissioner-General to his request of 26 March 1986, or to the collective request made by area staff on 26 February 1986, on 9 October 1986, the Applicant again wrote to the Commissioner-General, asking under what authority the Commissioner-General had made deductions from his credit account in the Provident Fund. In his reply, dated 23 October 1986, the Acting Commissioner-General stated that the matter had been discussed by the Provident Fund Advisory Committee, which had "decided ... that the Agency would not make up retroactively any exchange rate adjustments ...". He noted that there was "no staff rule which would authorize the Agency to make a deduction from [his] account nor [had] any deduction been made." The Applicant's account had been "adjusted to reflect the exchange rate movement between the dollar and the currency of the duty station at the end of the year, a procedure ... followed in one form or another every year since the Provident Fund [had been] established."

On 12 November 1986 and 20 May 1987, the Applicant reiterated his request for reconsideration of the decision regarding the manner in which his Provident Fund account had been credited. On 31 August 1987, he separated from service with the Organization.

In a letter dated 2 September 1987, the Director of Personnel informed the Applicant that the UNRWA administration could not meet his request. He referred to a decision "taken with effect from 1981, based on a recommendation of the staff unions, that staff in each Field and in Vienna would carry separately their own exchange rate risks", the so-called "plough back" system. He noted that "the implications of the system and the fact that it could lead to exchange rate losses as well as gains [had been]

fully explained, and it [had been] stressed that, in case of an exchange rate loss against the dollar in a particular currency, deductions from participants' credits in those currencies [would] occur".

On 24 August 1987, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The amounts standing to the Applicant's credit in the Provident Fund, to which he is entitled on withdrawal, as determined by the Respondent, are incorrect, because they were reduced as a result of the application of the "plough back" system - i.e. charging gains and losses on exchange rates to the amounts standing to the Applicant's credit. Instead, the amount should have been calculated solely on the basis of the currency in which his credit was kept - i.e. Austrian schillings.

2. The introduction of the "plough back" system was illegal as it is contrary to area staff rules 106.1, paragraph 8, and 109.10.

Whereas the Respondent's principal contentions are:

1. The introduction of the "plough back" system was solely within the authority of the Commissioner-General under paragraph 20 of area staff rule 106.1. Moreover, it had been done in complete agreement with the Provident Fund Advisory Committee, on which the staff was represented.

2. Rather than suffering any loss, the Applicant benefited from the "plough back" system by receiving a larger amount than he would otherwise have received. This was recognized by the Applicant who opted to leave his entitlements in the Fund in order to benefit from the system even after his separation from service.

The Tribunal, having deliberated from 14 to 17 November 1989, now pronounces the following judgement:

I. The Tribunal notes that the Respondent indicated in his answer that the Applicant, an area staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as

UNRWA) did not specify the basis of the Tribunal's jurisdiction. However, assuming that the Tribunal saw no objection, the Respondent presented his arguments on the merits of the case. Then, in his answer of 11 October 1988 to the Tribunal's questions, the Respondent indicated that in view of the special issues raised in the present case [he had not] raised any objection to the Tribunal's jurisdiction.

II. Under article 2 of its Statute, the Tribunal is competent to hear and pass judgement upon applications "of staff members of the Secretariat of the United Nations". Moreover, under article 11.1 and 11.3, the Secretary-General or any person in respect of whom a judgement has been rendered by the Tribunal may object to the judgement on the ground that the Tribunal has "exceeded its jurisdiction". A special committee is entrusted with deciding, where appropriate, to request the International Court of Justice to express an opinion on the issue in dispute. Under these provisions of the Statute, the Tribunal's competence cannot be based solely on agreement between the parties.

III. In the present case, the Tribunal's competence is derived from the lack of any jurisdictional procedure laid down by the UNRWA Staff Regulations and Staff Rules applicable to the Applicant. The Tribunal refers in this connection to its Judgement No. 461, Zafari (1989), whose grounds concerning its competence it adopts. It therefore establishes its competence in the present case.

IV. The Applicant challenges the calculations made by UNRWA to determine the credits entered in his acccount as at 31 December 1985 and 31 December 1986, in the UNRWA Provident Fund, in which he is a participant. The credits in question are final and cannot be changed retroactively. The Applicant will be in the same situation as he is now when his account is closed. The credits in question were entered in his account in 1985 and 1986, as a result of decisions that have a direct impact on the rights asserted by the Applicant. He has an interest in contesting the decisions in question. His application is therefore receivable. The situation

differs from the circumstances of the Katz case (Judgement No. 402 (1987)). In the Katz case, the Applicant's entitlements could not be calculated until the date on which her pension was paid.

V. The Tribunal, having considered the list of documents whose submission was requested by the Applicant, as well as the summary provided by the Respondent, believes that production of the documents in question is not necessary to enable it to pass judgement.

VI. The Applicant, a participant in the UNRWA Provident Fund, maintains that the calculations made by the Fund on 31 December 1985 and 31 December 1986, to establish the credits entered in his account at those two dates are not in conformity with the rules governing the Provident Fund.

VII. The Tribunal notes that the administration of the Fund is entrusted to the Commissioner-General of UNRWA in the following terms, laid down in area staff rule 106.1, paragraph 20:

> "20. Subject to the provisions of this rule, the Provident Fund shall be administered and controlled by and at the discretion of the Commissioner-General, and in accordance with such instructions and procedures as he may prescribe."

This paragraph confers on the Commissioner-General extensive discretionary powers. However, it prevents him from adopting any measures contrary to area staff rule 106.1.

VIII. In contesting the method of calculating credits entered in the accounts of Fund participants, the Applicant invokes staff rule 106.1, paragraph 8 (A) which reads:

> "8. (A) With effect from 1 January 1982, credits to participants' accounts shall be recorded in the following currencies depending on the participants' duty station:
>
> | Duty station | Currency |
> |---|---|
> | ... | ... |
> | Austria | Austrian schilling" |

IX. The Applicant indicates that the credits entered in his Provident Fund account on 31 December 1985 and 31 December 1986, were reduced to adjust for exchange rate losses resulting from the exchange rate used to convert amounts in United States dollars payable to him by the Fund into Austrian schillings. He adds the following: "My Provident Fund credit accounts are kept in Austrian schillings while UNRWA invests the assets of the Provident Fund in various currencies". The Applicant contends that "there is no reference whatsoever in the Provident Fund's rules to gains or losses on exchange rates between the currencies in which staff credit accounts are kept and the currencies in which the Provident Fund assets are invested".

X. The Tribunal does not consider it necessary to go into technical details concerning the implementation by the Fund of the so-called "plough-back" system. The issue on which the Tribunal must rule is whether the system was set up by the Commissioner-General in the exercise of his authority under area staff rule 106.1, paragraph 20. That paragraph provides that the Fund shall be "administered and controlled by and at the discretion of the Commissioner-General, and in accordance with such instructions and procedures as he may prescribe". The Commissioner-General is thus authorized to take any practical measures necessary for the Fund's administration. To that end, with a view to ensuring that exchange rate losses and gains were spread more fairly among all Fund participants, he prescribed the system challenged by the Applicant. The system in question had been proposed, recommended and accepted by the associations representing the staff.

XI. The Tribunal notes that the Area Staff Rules do not contain any specific rules on exchange rate losses and gains occuring in the administration of the Fund, for calculating the Fund's net income. The Commissioner-General therefore justifiable took account of such exchange rate losses and gains in establishing the Fund's net income.

XII. The Applicant argues that staff rule 106.1, paragraph 8 (A), which provides that credits to his Fund account should be recorded in Austrian

schillings, precludes any change in the level of such credits to adjust for exchange rate losses or gains of the Austrian schilling vis à vis the United States dollar. The Tribunal considers that this rule does not have the effect of prescribing any particular method of calculating exchange rate gains and losses.

XIII. The method used prior to 1981 spread exchange risks among all Fund participants. The new method, recommended by the Inter-Staff Union Conference and approved by the Commissioner-General, has the effect of having each participant bear exchange rate risks - whether favourable or unfavourable - associated with the value of the currency in which his or her Provident Fund account is kept, against the United States dollar. This method is not arbitrary. It applies equally to all Fund participants - it does not discriminate. The Tribunal considers it as a normal measure in connection with the Fund's administration.

XIV. The Tribunal notes, moreover, that the Commissioner-General took steps to protect staff members who retire at a time when the currency in which their Provident Fund account is kept has depreciated against the United States dollar. To that end, Fund participants were authorized to extend their participation for four years, then six years, following their retirement.

The Applicant retired on 31 August 1987. He chose to continue to be a Fund participant. He has still not decided to cease his participation which may continue until August 1983.

XV. The Tribunal notes that acceptance by the Applicant of the "plough-back" system indicates that the system is not prejudicial to him and that it is not inequitable.

XVI. The Tribunal therefore considers that the method of calculating exchange rate gains and losses was properly adopted by the Commissioner-General in the exercise of his powers under the UNRWA Area Staff Regulations and Staff Rules.

XVII. For the foregoing reasons,

All the pleas set forth in the application are rejected.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Ioan VOICU
Member

New York, 17 November 1989

R. Maria Vicien-Milburn
Executive Secretary